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IN THE
COURT OF APPEALS OF INDIANA

DEGOOD DIMENSIONAL CONCEPTS, INC.,	)	
Appellant,	)	
vs.	)	No. 93A02-1104-EX-390
REVIEW BOARD OF THE INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT,	)	
Appellee.	)	

APPEAL FROM THE REVIEW BOARD OF THE INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT
The Honorable Steven F. Bier, Chairperson
Cause No. 11-R-1088

November 22, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

DeGood Dimensional Concepts, Inc. ("Employer") appeals a decision by the Review Board of the Indiana Department of Workforce Development (the "Board") in favor of John Wilder on Wilder's claim for unemployment benefits. Employer raises several issues which we restate as whether the Board erred in concluding that Wilder was not terminated for just cause. We affirm in part, reverse in part, and remand.

The relevant facts follow. Wilder filed a claim for unemployment benefits, and on February 3, 2011, a claims deputy for the Indiana Department of Workforce Development issued a determination which found that Wilder was discharged for just cause for excessive absenteeism and reduced and suspended Wilder's unemployment benefits accordingly. On February 8, 2011, Wilder filed an appeal from the deputy's determination. On February 23, 2011, a telephonic hearing was held on Wilder's appeal before an administrative law judge (the "ALJ"), at which the parties presented emails, notifications, and the testimony of Wilder and Mary DeGood, a co-owner of Employer. Also on February 23, 2011, the ALJ issued a decision which reversed the deputy's determination and provided in part:

> FINDINGS OF FACT: The claimant worked for the employer from December 16, 2008 until December 30, 2010. The claimant worked as a full-time Sales Vice President and earned approximately $55,000 annually. The employer discharged the claimant for a combination of reasons, including attendance, tardiness, not following directions, insubordination, abuse of telephone rules, trouble getting along with co-workers and other reasons. . . . The employer would have terminated the claimant for the alleged absenteeism and/or tardiness alone but actually terminated the claimant due to a combination of all of the above stated reasons.
>
> The employer has an attendance/tardiness policy that results in termination for clocking in late or failing to clock into the employer's time keeping system on 15 occasions. The employer did not submit a copy of its policy

for the record. The claimant did not stipulate to the contents of the employer's policy. The claimant was not aware of the employer's policy. The employer discharged the claimant on January 5, 2011 when the claimant was absent after having received a final written warning for attendance.

CONCLUSIONS OF LAW: In matters involving discharge, an employer bears the burden of establishing a prima facie showing of just cause for termination. Owen County v. Indiana Dep't of Workforce Dev., 861 N.E.2d 1282, 1291 (Ind. Ct. App. 2007).

Under Indiana Code § 22-4-15-1(d)(2), the definition of discharge for just cause includes a "knowing violation of a reasonable and uniformly enforced rule of an employer." IC § 22-4-15-1(d)(2). To establish a prima facie case that a discharge was for just cause based upon a rule violation, it is necessary for the employer to show: (1) a rule existed; (2) it was reasonable; (3) the rule was uniformly enforced; (4) the rule was a known rule; and (5) the employee knowingly violated the rule.

In Stanrail Corp. v. Review Bd. of Dept. of Workforce Development, 735 N.E.2d 1197, 1205 (Ind. Ct. App. 2000)[, trans. denied,] the Court stated:

> An employer's asserted work rule must be reduced to writing and introduced into evidence to enable this court to fairly and reasonably review the determination that an employee was discharged for "just cause" for the knowing violation of a rule. In Watterson v. Review Bd. of Indiana Dep't of Employment & Training Serv., 568 N.E.2d 1102 (Ind. Ct. App. 1991), the claimant's employment was terminated for allegedly violating the employer's rule regarding tardiness and excessive absences. However, no written rule was introduced into evidence, and the substance of the policy was explained by the employer's oral testimony. In reversing the Board's decision, which denied the claimant benefits, we determined that "absent stipulation of the parties, the employer must present the rule it relies on to justify its discharge of an employee for just cause in writing."

[(Internal citations omitted).] The employer failed to introduce its rule into evidence, and the claimant did not stipulate to the contents of the rule. The employer's rule is critical to a determination as to whether the rule is reasonable and whether the claimant knowingly violated the rule. Indeed, the claimant was not aware of the employer's rule. Therefore, the [ALJ]

> concludes that the employer did not meet its burden of proof to show that the claimant knowingly violated a reasonable and uniformly enforced rule.
>
> As an aside, the [ALJ] notes that the employer cited other reasons as a basis for the claimant's discharge. However, the employer provided credible testimony that the claimant was discharged for a combination of all of the stated reasons, absenteeism and tardiness included. Given that the [ALJ] concludes that the employer failed to prove that the claimant violated the employer's attendance and tardiness policy, any further analysis of the other stated reasons for discharge is unnecessary. Accordingly, the [ALJ] concludes that the claimant was discharged but not for just cause as defined by Ind. Code § 22-4-15-1.

Appellant's Appendix at 3-4.

Employer appealed the decision of the ALJ. On March 28, the Board affirmed the decision of the ALJ. Employer now appeals the Board's decision.

The issue is whether the Board erred in concluding that Wilder was not terminated for just cause. The Indiana Unemployment Compensation Act provides that "[a]ny decision of the review board shall be conclusive and binding as to all questions of fact." Ind. Code § 22-4-17-12(a). However, Ind. Code § 22-4-17-12(f) provides that when the Board's decision is challenged as contrary to law, the reviewing court is limited to a two part inquiry into: (1) "the sufficiency of the facts found to sustain the decision;" and (2) "the sufficiency of the evidence to sustain the findings of facts." McClain v. Review Bd. of Ind. Dep't of Workforce Dev., 693 N.E.2d 1314, 1317 (Ind. 1998), reh'g denied. The Indiana Supreme Court clarified our standard of review of the Board's decisions in McClain:

> Review of the Board's findings of basic fact [is] subject to a "substantial evidence" standard of review. In this analysis the appellate court neither reweighs the evidence nor assesses the credibility of witnesses and considers only the evidence most favorable to the Board's findings.

> The Board's conclusions as to ultimate facts involve an inference or deduction based on the findings of basic fact. These questions of ultimate fact are sometimes described as "questions of law." They are, however, more appropriately characterized as mixed questions of law and fact. As such, they are typically reviewed to ensure that the Board's inference is "reasonable" or "reasonable in light of [the Board's] findings." The term "reasonableness" is conveniently imprecise. Some questions of ultimate fact are within the special competence of the Board. If so, it is appropriate for a court to exercise greater deference to the "reasonableness" of the Board's conclusion. . . . However, not all ultimate facts are within the Board's area of expertise. As to these, the reviewing court is more likely to exercise its own judgment. In either case the court examines the logic of the inference drawn and imposes any rules of law that may drive the result. That inference still requires reversal if the underlying facts are not supported by substantial evidence or the logic of the inference is faulty, even where the agency acts within its expertise, or if the agency proceeds under an incorrect view of the law.

Id. at 1317-1318 (citations and footnotes omitted).

In Indiana, an employee is ineligible for unemployment benefits if he or she is discharged for just cause. Stanrail Corp. v. Review Bd. of Dep't of Workforce Dev., 735 N.E.2d 1197, 1202 (Ind. Ct. App. 2000), trans. denied; Ind. Code § 22-4-15-1.[1] Ind. Code § 22-4-15-1(d) provides that "[d]ischarge for just cause" is defined to include a "knowing violation of a reasonable and uniformly enforced rule of an employer . . . ."

[1] Ind. Code § 22-4-15-1(a) provides in part:

> [A]n individual who has voluntarily left the individual's most recent employment without good cause in connection with the work *or who was discharged from the individual's most recent employment for just cause* is ineligible for waiting period or benefit rights for the week in which the disqualifying separation occurred and until the individual has earned remuneration in employment equal to or exceeding the weekly benefit amount of the individual's claim in each of eight (8) weeks.

(Emphasis added).

Employer argues that the Board and ALJ erred "by requiring all six stated grounds for discharge to be supported in the record by substantial evidence." Appellant's Brief at 7. Employer asserts that, in addition to unacceptable attendance issues, Wilder had "brought into the Employer's premises outside machine representatives after being told to cease holding these meetings; misused company telephone for personal reasons and not as instructed; and used the Employer issued ATM card for personal reasons all of which constituted failure to obey, i.e., insubordination." Id. at 9. Employer maintains that Wilder "had received sufficient warnings in two sets of formal warnings." Id. Employer further argues that the Board erred in determining that discharge for just cause requires a rule regarding attendance to be in writing and in the record and that "[t]here was substantial evidence in the record that the basic underlying facts established that the Employer had reasonable rules regarding attendance, tardiness and hours worked that [Wilder] refused follow . . . ." Id. at 16-17. Employer argues that "[a]lthough a handbook was never admitted into evidence, the policy was read into the record." Id. at 19.

The Board argues that, based upon the testimony at the hearing "it was reasonable for the ALJ to conclude that [Employer] terminated [Wilder] for a combination of the six factors listed" and that the Board "properly adopted the ALJ's factual finding that it was a combination of reasons for which [Wilder] was terminated and not just one of any of the six listed factors." Appellee's Brief at 8-9. The Board further argues that it properly found that Employer "was required to submit its attendance policy as evidence in order to meet its burden of showing that [Wilder] knowingly violated its attendance policy." Id.

at 9. Specifically, the Board argues that "[b]ecause [Employer] failed to submit its policy at the hearing before the ALJ, it did not meet its burden of showing that [Wilder] knowingly violated a reasonable and uniformly enforced rule."[2] Id. at 10.

The employer bears the initial burden of establishing that an employee was terminated for just cause. Coleman v. Review Bd. of Ind. Dep't of Workforce Dev., 905 N.E.2d 1015, 1019-1020 (Ind. Ct. App. 2009). To establish a *prima facie* case for just cause discharge for violation of an employer rule, the employer has to show that the claimant: (1) knowingly violated; (2) a reasonable; and (3) uniformly enforced rule. Id. at 1020; Stanrail, 735 N.E.2d at 1203. To have knowingly violated an employer's rules, the employee must: (1) know the rule; and (2) know his conduct violated the rule. Stanrail, 735 N.E.2d at 1203. If an employer meets this burden, the claimant must present evidence to rebut the employer's *prima facie* showing. Coleman, 905 N.E.2d at 1020; Stanrail, 735 N.E.2d at 1203.

[2] The Board also argues that Employer failed to raise the issue on appeal to the Board from the ALJ's determination as to whether any one of the six reasons cited standing alone was sufficient to establish just cause and that thus the issue is waived. In its reply brief, Employer argues that "[t]he appeal of [Employer] was an appeal of the entire decision of the ALJ and its underlying analysis of the facts and the law" and that "[n]owhere does the ALJ appeal notice state that the 'explanation of the reason for appeal' requires a specific statement analysis of all appeal issues to be raised separately . . ." Appellant's Reply Brief at 1-2. Employer's appeal of the ALJ's decision provided in part that "[t]his is a written request appealing the 'reversed' decision regarding the unemployment of [Wilder] dated 2/23/11" and also in part that "[t]he is [sic] appeal is to show that [Employer] has additional documentation that was not available at the time of the ALJ hearing to provide evidence that [Employer] had given the claimant a copy of the company handbook and policies." Appellee's Appendix at 1. Although Employer's appeal from the ALJ's decision specifically refers to evidence regarding its attendance rules, we note that Employer expressly appealed "the 'reversed' decision regarding the unemployment" see Appellee's Appendix at 1, and that the ALJ's finding that Wilder was discharged "for a combination of all of the stated reasons" was necessary to the ALJ's determination that Wilder was discharged but not for just cause. See Appellant's Appendix at 4. Based upon the findings of the ALJ and Employer's appeal from the ALJ's decision, we do not find the Board's waiver argument persuasive.

The ALJ and Board found that Employer "discharged the claimant for a combination of reasons, including attendance, tardiness, not following directions, insubordination, abuse of telephone rules, trouble getting along with co-workers and other reasons." Appellant's Appendix at 3. We address the findings of the ALJ and Board related to: (A) Employer's reasons for discharging Wilder of absenteeism and tardiness; and (B) the fact that Wilder was discharged for a combination of reasons.

A. Absenteeism and Tardiness

Employer bore the burden to establish that it had a rule that was reasonable and uniformly enforced. A uniformly enforced rule is one that is carried out in such a way that all persons under the same conditions and in the same circumstances are treated alike. Gen. Motors Corp. v. Review Bd. of Ind. Dep't of Workforce Dev., 671 N.E.2d 493, 498 (Ind. Ct. App. 1996). "In order to evaluate uniformity one must first define the class of persons against whom uniformity is measured." Stanrail, 735 N.E.2d at 1203.

This court has often stated that "[a]n employer's asserted work rule must be reduced to writing and introduced into evidence to enable this court to fairly and reasonably review the determination that an employee was discharged for 'just cause' for the knowing violation of a rule." Id. at 1205 (citing KBI, Inc. v. Review Bd. of the Ind. Dep't of Workforce Dev., 656 N.E.2d 842, 844 (Ind. Ct. App 1995)); see also Doughty v. Review Bd. of Dep't of Workforce Dev., 784 N.E.2d 524, 527 (Ind. Ct. App. 2003) (citing Watterson v. Review Bd. of Ind. Dep't of Emp't & Training Serv., 568 N.E.2d 1102, 1105 (Ind. Ct. App. 1991) (stating that reducing rule to writing and introducing it

into evidence is "the minimum evidence necessary for the employer to satisfy its burden that it has a rule and that that rule is reasonable and uniformly enforced")).

Here, the ALJ concluded and the Board agreed that Employer failed to introduce its written rule regarding attendance and tardiness and that Wilder was not aware of Employer's rule. Employer does not point to the record to show that it had introduced the written rule or policy or that Wilder stipulated to the contents of the rule at the hearing. Although Employer submitted copies of email correspondence, performance notifications, and warnings related to Wilder and his work, Employer failed to submit a written policy published to its employees. The email correspondence and other documents admitted into evidence certainly show that there were concerns related to Wilder's work performance and perhaps conduct involving other employees. However, such evidence does not establish that Wilder had violated a company- or department-wide policy, and it does not enable us to define the class of persons against whom uniformity is measured and therefore cannot show that the policy was uniformly applicable to all employees similarly situated.

In addition, to the extent Employer argues that "[a]lthough a handbook was never admitted into evidence, the policy was read into the record," see Appellant's Brief at 19, we note that DeGood testified on behalf of Employer as to the wording of a portion of Employer's attendance policy.[3] DeGood further testified that "[a]t one point in time, in

[3] When asked to read the relevant portion of Employer's written policy, DeGood testified:

> Regular attendance and punctuality is expected of all employees. Absences and lateness disrupt operations, effect [sic] work schedule and burden other employees who have to cover for those absent. Notification of absence or lateness. Employees should phone

September, we did want . . . him to start swiping a time card," that he "was told he was to come in by 8:00 in the morning, and work until 5:00 in the afternoon," and that "we still enforce the same policies with him that we would anyone else that swipes a time card." Transcript at 8. When asked by the ALJ "the policy that Employer based it's [sic] decision to terminate [Wilder] on," DeGood responded: "For example, five late clock ins. The employee receives a verbal written warning that you're [sic] action is needed to improve. Ten late clock ins. Employee receives one unpaid day of work and written warning to improve. Fifteen late clock ins. Employee is terminated for fifteen late clock ins . . . ." Id. DeGood later testified that "[e]mployees are allowed three missed clock ins in a one year period. Five unexcused clock ins is a verbal warning. Eight unexcused clock ins is a written warning. Ten unexcused clock ins is one day off, and fifteen unexcused clock ins is termination of employee." Id. at 9. Wilder testified that he had "never seen that policy" and "couldn't find a copy of any of that." Id. DeGood also testified, and Wilder indicated in the submitted email correspondence, that Wilder was a salaried employee.

Although Employer read a portion of its written attendance policy at the hearing, such evidence, like the email correspondence and other exhibits, does not establish the written provisions to which Wilder was subject at various points during his employment.

> their supervisors before the start of their shift when they will be absent or late. Fail, failure to call in is due to emergencies or car break down will be dealt with on a case by case basis. Employees should leave a voice message for their supervisor if nobody answers the phone. If you know you will be late or absent on a future work day, inform your supervisor of the date and reason in (INAUDIBLE). Employees must inform their supervisor if they need to leave early for any reason.

Transcript at 7-8.

Neither does it prove which provisions regarding his attendance or tardiness were violated or provided the basis for Wilder's discharge or enable us to review the reasonableness of the policy, or show that the policy was uniformly applicable to all employees similarly situated. See Watterson, 568 N.E.2d at 1104-1106 (noting that the employer presented oral testimony regarding its attendance tardiness rule, finding that the dispute centered around what the employer's rule stated and whether the rule was reasonable, and held that the employer must present in writing the rule it relies on to justify its discharge of an employee for just cause); Blackwell v. Review Bd. of Ind. Dep't or Emp't and Training Services, 560 N.E.2d 674, 679 (Ind. Ct. App. 1990) (holding, where the only evidence of the employer rule was presented through oral testimony, that because the rule was neither introduced into evidence in written form or stipulated to by the parties, it is impossible for the court to fairly and reasonably review the Board's decision).

Based upon the record, we conclude that there is substantial evidence supporting the Board's findings and conclusions that Employer failed to carry its burden of showing that Wilder violated a reasonable and uniformly enforced attendance rule.[4] See Stanrail,

[4] Employer also appears to argue that Wilder violated terms of an employment agreement which demonstrates that the discharge was for just cause. At the hearing before the ALJ, Employer submitted what appear to be two pages of an Employment Agreement with Wilder signed December 16, 2008, which state in part: "Working out of personal home, forty hours a week minimum." Exhibits at 90. Apparently a second employment agreement was entered sometime in 2010. An email message in September 2010 indicates that Wilder believed he was a "salaried employee," that he was "comfortable working 40 hours," that he had "no desire to go back to an hourly employee," and that he was "not comfortable going backwards in [his] career & [] cannot honor this change in our agreement." See id. at 73. Wilder also stated in the email message that he was "not comfortable entering into in [sic] any agreement/agreements outside of our signed agreement dated 2010. I am sure you understand." Id. Employer does not point to the second employment agreement in the record, and we observe that, at least

735 N.E.2d at 1204-1206 (noting that the employer had both written and unwritten attendance policies and that it did not strictly enforce a limit on absences under the written attendance policy and affirming the Board's decision granting unemployment benefits to the claimant); Watterson, 568 N.E.2d at 1104-1106 (noting that the employer's work rule had been reduced to writing but that it had not been introduced into evidence and holding that the court was unable to discern whether the rule is reasonable and uniformly enforced and that the employer failed to show that the employee's discharge was for just cause on that basis). Accordingly, we affirm the findings of the ALJ and Board related to Wilder's discharge on the bases of absenteeism and tardiness.

B. Combination of Reasons

With respect to the reasons provided by Employer for Wilder's discharge other than attendance and tardiness, the ALJ and Board found:

> As an aside, the [ALJ] notes that the employer cited other reasons as a basis for the claimant's discharge. However, the employer provided credible testimony that the claimant was discharged for a combination of all of the stated reasons, absenteeism and tardiness included. Given that the [ALJ] concludes that the employer failed to prove that the claimant violated the employer's attendance and tardiness policy, any further analysis of the other stated reasons for discharge is unnecessary. Accordingly, the [ALJ] concludes that the claimant was discharged but not for just cause as defined by Ind. Code § 22-4-15-1.

Appellant's Appendix at 4.

At the hearing, Employer submitted two performance notifications related to Wilder's work performance. A notification dated August 23, 2010 indicates that Wilder

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for portions of Wilder's employment, he was not required to clock in and out, was permitted to work from home, and was a salaried employee.

was presented with "numerous topics covering areas of job responsibilities" which consisted of, among other matters, discussing Wilder's purchase of business cards without permission, that Wilder was to have "no more meetings with Machine Tool or Equipment companies," a "derogatory comment" Wilder made to other employees regarding DeGood, Wilder's "inappropriate behavior regarding others being approached while in the bathroom regarding the situation of the phones being down," that "the phone lines being down or any other situation regarding the need of repairs are handled or resolved by Scott and Mary [DeGood]," Wilder's "connection to GEMM" and that he "is not [to] be representing them in anyway," and "why guns were on the property after being told specifically . . . that they were not to be." Exhibits at 12-13. A notification dated September 8, 2010 indicates that Wilder was given two days off as a penalty and placed on a three-month probation, and summarized issues related to Wilder's work habits, which included numerous purchases which were not pre-approved, numerous inappropriate comments towards the company regarding shop appearance and salary, a problem related to the online display of a product presented to Employer as owned by Wilder which almost resulted in litigation, and continual problems with reports not being received.

Moreover, the record reveals that the following exchange occurred between the ALJ and DeGood on behalf of Employer at the hearing:

> Q. [ALJ] What was the reason given to [Wilder] for the discharge?
>
> A. [DeGood] There was [sic] various reasons on a performance notification that was given to him that was dated January 5th. That would be your Exhibit D on page one. There was several items that

were checked on our, the type of infraction. The first one was excessive work days missed. The second one was excessive tardiness. The third one was supervisor directions are not followed. The fourth one was insubordination. The fifth one was excessive abuse of telephone rules. The sixth one was has trouble getting along with others. And then we have an other [sic] column which was also checked, which there are summary pages . . . that are attached to that performance notification.

Q. Okay, so is it your testimony that all of these reasons were the reason why [Wilder] was discharged?

A. Yes.

Q. Okay, of the reasons that are listed, would any of them have, would have been sufficient for [Wilder] to be discharged, or was it a combination of all of them?

A. Just the, you know, tardiness alone would've been sufficient, but he had actually been previously warned on two other occasions with basis for some of the other items and it, you know, just progress, progressively accumulated.

Transcript at 6.

Later during the hearing, the following exchanges occurred between the ALJ and DeGood:

Q. Had [Wilder] not had the attendance and tardiness issues, would he still have been discharged?

A. Yes. It's very likely yes that he would have, yes.

* * * * *

Q. After [Wilder] was put on probation, was there a final incident related to his work performance that caused him to be discharged?

A. No, it was still just an accumulation of various things that you know, had been discussed with him verbally and in writing, and in emails.

* * * * *

Q. [I]s there anything else you'd like to add?

A. Yeah . . . [Wilder] was not terminated just for his attendance or tardiness. There was various other things which are all covered in the summaries.

Q. And it was a combination of all the things, right?

A. Exactly, and one of the final things was a notification to us by one of the employees . . . that [Wilder] had approached her to go to a company that actually does business for us. [Wilder] asked [the employee] if she would after hours go over there and show them how to do proprietary services that we perform here internally and show them how to do it and that she could make money from it if she would do that, which she refused to do, and brought it to our attention . . . .

Id. at 23, 27-28, 34.

While the ALJ and Board found that Wilder was "discharged for a combination of all of the stated reasons," see Appellant's Appendix at 4, this finding does not necessarily lead to the determination or conclusion that Wilder was discharged only because all six reasons for discharge existed and were considered together.

Based upon the record, we conclude that the logic of the inference drawn by the ALJ and Board that Wilder would not have been discharged except for the existence of all of the reasons stated by Employer was faulty. Accordingly, we reverse and remand for consideration of the other reasons cited by Employer as bases for Wilder's discharge and for additional findings as to whether Wilder's discharge was for just cause. See

Beckingham v. Review Bd. of Ind. Dep't of Workforce Dev., 927 N.E.2d 913, 915 (Ind. 2010) (noting that the Board specifically addressed the reasons for some, but not all, of the occurrences serving as the bases for the claimant's discharge and reversing and remanding the decision of the Board for additional fact-finding related to whether the claimant was discharged for just cause).

For the foregoing reasons, we reverse the determination of the Board and remand for additional findings.

Affirmed in part, reversed in part, and remanded.

BAKER, J., and KIRSCH, J., concur.